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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

RICHARD E. FARLEY,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether pre-accident, post-manufacture evidence is excludable as a subsequent remedial measure under Rule 407 of the Federal Rules of Evidence?

2. Whether a federal procedural rule of evidence may be used to supplant a state substantive cause of action?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Third Circuit: Richard E. Farley (Appellant) and The Cessna Aircraft Company (Appellee).

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PETITION FOR WRIT OF CERTIORARI

Richard E. Farley respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The final order of the court of appeals on petition for rehearing (App. 1a-2a) is not reported. The decision of the court of appeals affirming the district court (App. 3a-4a) is reported at 101 F.3d 690 (3d Cir. 1996). The memorandum and order of the district court denying Farley's motion for a new trial and for judgment as a matter of law and granting in part Farley's motion to supplement the record (App. 8a-34a) is cited at 1996 WL 37823 (E.D. Pa.) and at 1996 U.S. Dist. LEXIS 941. The memorandum order on Cessna's motion for reconsideration of the district court's order permitting supplementation of the record and to correct a clerical error in the judgment (App. 5a-7a) is cited at 1996 WL 190065 (E.D. Pa.) and at 1996 U.S. Dist. LEXIS 5079.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1996. (App. 3a-4a). On November 26, 1996, the court of appeals denied a petition for rehearing and suggestion for rehearing *en banc* filed by petitioner. (App. 1a-2a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

This case involves Rule 407 of the Federal Rules of Evidence. This rule is set forth in the Appendix. (App. 35a).

STATEMENT OF THE CASE

Richard E. Farley ("Farley") was gravely injured in the crash of a Cessna 140 aircraft on April 7, 1993. Farley commenced this diversity action, pursuant to 28 U.S.C. § 1332, against The Cessna Aircraft Company ("Cessna") on December 21, 1993 to recover for the personal injuries he sustained in the accident as the result of defects in the Cessna 140 airplane. The complaint set forth the following causes of action under Pennsylvania law: strict liability in tort under section 402A of the RESTATEMENT (SECOND) OF TORTS, negligence, breach of warranty, and willful and wanton misconduct. (J.A. at 21-39). Farley pursued two theories at trial, the first being that defects in the fuel system caused the aircraft to lose power and crash, the second being that his injuries were enhanced by Cessna's failure to install shoulder harnesses.

Trial was set for May 1, 1995. Pretrial memoranda and motions in limine were required to be filed by January 2, 1995. (J.A. at 52). Farley's pretrial memorandum identified various exhibits, including service bulletins and service information letters sent by Cessna to aircraft owners and to mechanics, internal engineering documents and inter-company memoranda, safety recommendations from the National Transportation Safety Board

recommending measures for the detection and elimination of water from the fuel systems of Cessna aircraft, and correspondence from the Federal Aviation Administration repeatedly chastising Cessna for its failure to correct known safety hazards and directing Cessna to take remedial action. (J.A. at 404-620). This body of evidence predated the accident, and was essential to Farley's ability to show the defects in the airplane and that Cessna knew of the defects and the means to correct them after manufacture but prior to the accident, both for purposes of his negligence and strict liability claims.

On the morning jury selection was set to begin, Cessna argued for the first time that all pre-accident, post-manufacture evidence was irrelevant and inadmissible under Rule 407 of the Federal Rules of Evidence. (J.A. at 321-26). Cessna argued that its post-sale duty to warn of defects, part of Farley's strict liability claim under Pennsylvania law, *see Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 456 (1992), was superseded by the decision of the United States Court of Appeals for the Third Circuit in *Kelly v. Crown Equipment Co.*, 970 F.2d 1273 (3d Cir. 1992), and that pre-accident, post-manufacture evidence was inadmissible under *Kelly* and another Third Circuit case, *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987), to show either failure to warn or design defect. (J.A. at 1105, 1120).

Faced with this last minute challenge to an entire body of highly probative evidence of Cessna's notice of dangerous defects prior to the accident, the trial court instructed counsel not to mention the evidence during opening statements while the court reviewed the Third Circuit precedent:

> The Third Circuit apparently has taken the position that Rule 407 rules of evidence supersedes the law of Pennsylvania as respects post-sale duty to warn. That's my initial feeling now.
>
> I just want to make the ruling provisionally though I'll make a final ruling on that, I don't think, it will not burden the offer of evidence, I'm sure, but I would just like – this is Tuesday. I would like to make a final ruling on Thursday morning.
>
> . . . .
>
> My initial pass as it tells me, while there is, under some limited conditions, post-sale duty to warn obligations in product liability cases, apparently the Federal Rules of Evidence may, to a certain extent, preclude that evidence being admitted as being post-sale, remedial conduct which is generally inadmissible.

(J.A. at 1120-21).

This "provisional" ruling by the district court became the law of the case, with the district court ruling that the post-sale duty to warn obligation under state law was eliminated by Rule 407, which precluded the admission of post-sale evidence. (J.A. at 376-77). In so ruling, the district court was constrained by *Kelly*, whose rationale the court articulated as being to encourage "manufacturers and others", including "strangers", to make developments and improvements without "product liability culpability for some earlier event". (J.A. at 1124, 1223, 1224).

Based on the court's exclusion of categories of pre-accident, post-manufacture evidence, as well as evidence

of other accidents, Farley was forced to withdraw his negligence claim and proceed on strict liability only. After a month-long trial where the jury heard nothing about the service or accident history of the airplane, the jury returned a verdict in favor of Cessna on May 30, 1995.

Judgment was entered on June 2, 1995. Farley filed timely post-trial motions. (J.A. at 351-66). Farley also filed a motion to supplement the record with sixty-eight exhibits which Farley would have offered to show negligence or product defect, but which were not formally proffered by virtue of the preclusion order relating to pre-accident, post-manufacture corrective and remedial measures. (J.A. at 340-50). That motion was granted. (App. 28a-29a).

The post-trial motions were denied. In rejecting Farley's motion for a new trial, the district court looked to the Third Circuit precedent by which it was bound:

> The admission of evidence of Cessna's pre-accident, post-manufacture conduct for this purpose conflicts with the purpose of Rule 407, which is to encourage manufacturers to take affirmative steps to make their products safer, and the Third Circuit's rulings in *Petree I* and *Kelly*. For this reason, the court ruled that evidence of Cessna's pre-accident, post-manufacture remedial conduct was inadmissible for the purpose of proving negligence or a defect in the product.

(App. 17a). The district court further noted it was required to follow the holding of the Third Circuit in *Kelly* "that Rule 407 applies to exclude evidence of pre-accident, post-manufacture design changes in diversity actions applying Pennsylvania law, even though Rule 407

directly conflicts with Pennsylvania products liability law. [907 F.2d] at 1278." (App. 17a). The district court thus concluded "that its ruling to exclude evidence of Cessna's pre-accident, post-manufacture remedial conduct was correct based on the applicable law of the Third Circuit". (App. 16a).

In denying a subsequent motion for reconsideration by Cessna of the order granting Farley's motion for leave to supplement the record to include the pre-accident evidence of remedial measures to prove negligence or that the aircraft was defective when manufactured, the district court affirmed that its evidentiary rulings were governed by the Third Circuit's ruling in *Kelly*:

> If the Court of Appeals rules that a manufacturer's post manufacture remedial and corrective measures concerning a product are admissible by a plaintiff to prove the defendant was negligent, or that its product was defective when manufactured, there would presumably have to be a new trial because of the court's ruling excluding them by the authority of *Kelly v. Crown Equipment Co.*, 970 F.2d 1273 (3d Cir. 1992).

(App. 6a-7a).

Farley took a timely appeal to the Third Circuit. On appeal, Farley argued that the interpretation of Rule 407 espoused by the Third Circuit conflicted not only with the plain language of the rule but with the decisions of every other court which had interpreted what constitutes a Rule 407 "event"; that the rule in the Third Circuit that a procedural rule of evidence supersedes state substantive law is violative of the *Erie* doctrine; and that, *Kelly*

and *Petree* notwithstanding, the district court committed reversible error in applying Rule 407 to exclude any pre-accident conduct by government regulators and by third parties other than Cessna.

Prior to oral argument, the panel directed additional briefing on the effect of the withdrawal of the negligence claim at trial on the preservation of that issue on appeal. The panel held that Farley had failed to preserve the negligence claim for appeal. The district court's evidentiary rulings as they related to the strict liability claim were affirmed. (App. 3a-4a).

Farley petitioned for rehearing, asking the entire Third Circuit to set aside *Petree* and *Kelly* on the ground that the decisions were contrary to the decisions of every other circuit and contrary to decisions of this Court. Rehearing was denied. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

The Third Circuit has interpreted Rule 407 to exclude pre-accident conduct in a manner which conflicts with the text of the rule itself. Under the express terms of Rule 407, the term "event" refers to the time of the accident or injury to the plaintiff, not to the time of manufacture of the product or creation of the hazard.

The Third Circuit, standing alone, holds that Rule 407 applies and operates to preclude pre-accident remedial measures or conduct. The Third Circuit has interpreted Rule 407 in a manner which conflicts with decisions of

the First, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, all of which hold that the relevant Rule 407 "event" is the accident, and that Rule 407 does not operate to exclude pre-accident remedial measures or conduct.

It is well recognized in the Third Circuit and every other circuit that Congress did not intend the Federal Rules of Evidence to preempt state substantive law. Indeed, under the *Erie* doctrine, the federal courts and Congress are constitutionally precluded from displacing state substantive law with federal substantive rules in diversity actions. The Third Circuit's rule that Rule 407 supersedes state substantive law is contrary to decisions of the Court under the *Erie* doctrine and the fundamental principles of federalism and comity by which the federal and state judicial systems co-exist.

ARGUMENT

I. THE THIRD CIRCUIT'S APPLICATION OF FED. R. EVID. 407 DIRECTLY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THE PLAIN LANGUAGE OF THE RULE ITSELF.

The decision of the Third Circuit here, and its prior decisions in *Petree* and *Kelly* that Rule 407 applies to pre-accident, post-manufacture conduct, are in direct, active conflict with recent holdings of other circuits. Under Rule 407, only measures which take place "after an event" which "would have made the event less likely to occur" are potentially excludable as proof of liability. *See* Fed. R. Evid. 407.

The First, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits all hold that the term "event" in Rule 407 refers to the accident or the injury to the plaintiff and not to manufacture, sale, or creation of a hazard. *See, e.g., In re Air Crash Disaster,* 86 F.3d 498, 531 (6th Cir. 1996) (interpretation of Rule 407 to exclude post-design remedial measures "contradicts the text of Rule 407"); *Traylor v. Husqvarna Motor,* 988 F.2d 729, 733 (7th Cir. 1993) (Rule 407 "event" in accident case is accident rather than sale of defective product by manufacturer); *Raymond v. Raymond Corp.,* 938 F.2d 1518, 1523 (1st Cir. 1991) (term "event" refers to accident which precipitated lawsuit); *Cates v. Sears Roebuck & Co.,* 928 F.2d at 686 ("event" to which Rule 407 speaks is the accident and not sale); *City of Richmond v. Madison Management Group, Inc.,* 918 F.2d 438, 459-60 (4th Cir. 1990) ("event" is bursting of pipe and not sale of pipe); *Huffman v. Caterpillar Tractor Co.,* 908 F.2d 1470, 1481 (10th Cir. 1990) (en banc) ("event" refers to time of accident or injury to plaintiff and not to time of manufacture or creation of hazard); *Roberts v. Harnischfeger Corp.,* 901 F.2d 42, 44 n.1 (5th Cir. 1989) ("event" is injury to plaintiff); *Chase v. General Motors Corp.,* 856 F.2d 17, 22 (4th Cir. 1988) (Rule 407 "event" is time of accident); *Rimkus v. Northwest Colorado Ski Corp.,* 706 F.2d 1060, 1064 (10th Cir. 1983) ("after the accident"). *Cf. Wood v. Morbark Industries, Inc.,* 70 F.3d 1201, 1207 (11th Cir. 1995) ("Rule 407 is necessary in [strict products liability] cases to focus the jury's attention on the product's condition or design at the time of the accident").

Respected commentators concur with this interpretation of the term "event" in Rule 407. *See generally* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE at 266 (3d ed.

1991); S. SALTZBURG, M. MARTIN & D. CAPRA, 1 FEDERAL RULES OF EVIDENCE MANUAL at 489 (6th ed. 1994); 2 WEINSTEIN'S EVIDENCE ¶ 407[01] at 407-2 (1992); C. WRIGHT & K. GRAHAM, 23 FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5283 (1980 & Supp. 1996).

The plain meaning of the phrase "would have made the event less likely to occur," suggests reference to the accident or injury, not manufacture. *Huffman, supra,* 908 F.2d at 1481-82 (en banc). Subsequent remedial measures concern the likelihood of the *accident* occurring and not the likelihood of the *manufacture* of the product occurring. Indeed, substituting the word "manufacture" for "event" renders Rule 407 incomprehensible:

> When, *after [manufacture],* measures are taken which, if taken previously, would have made the *manufacture* less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the *manufacture.*

"While the focus of a product liability case is on the dangers inherent in the product as it leaves the manufacturer, the relevant time under Rule 407 is the accident." *Cates v. Sears, Roebuck & Co.,* 928 F.2d 679, 686 (5th Cir. 1991). Because the relevant event under Rule 407 is the accident, rather than manufacture, other circuits hold that Rule 407 does not operate to exclude modifications or conduct which occurred after manufacture but before the accident. *See, e.g., In re Air Crash Disaster,* 86 F.3d at 531 (Rule 407 "does not exclude evidence taken after the design of the product but before the accident"); *Raymond, supra,* 938 F.2d at 1518 (modifications to another model

sideloader manufactured two years after model in products liability case but years prior to accident were not subsequent remedial measures under Rule 407); *Chase v. General Motors Corp.*, 856 F.2d at 21 (4th Cir. 1988) (exclusion under Rule 407 of evidence of change in brake design that occurred after manufacture and sale of allegedly defective vehicle but before accident was improper); *Arceneaux v. Texaco, Inc.*, 623 F.2d 924, 928 (5th Cir. 1980) (exclusion under Rule 407 of evidence of change in position of gas tank that occurred after manufacture of truck but before accident was improper), *cert. denied*, 450 U.S. 928 (1981); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978) (evidence of remedial step taken by car manufacturer between date of sale of car and date of car accident admissible because Rule 407 event was car accident and not car sale).

In holding otherwise, the Third Circuit looks to policy reasons rather than the plain text of the rule.[1] *See, e.g., Kelly*, 970 F.2d at 1276; *Petree*, 831 F.2d at 1198. The policy reasons articulated – that proof of post-manufacture remedial measures should not be used as an admission that the product was defective at the time of sale – directly conflict with the substantive state policy adopted by the Pennsylvania Supreme Court that manufacturers like Cessna have a continuing duty to warn of defects.

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[1] In *Kelly*, the Third Circuit noted that the *Petree* court "apparently did not confront the language of the Rule which specifically limits its application to measures taken *"after an event . . .* which, if taken previously, would have made *the event* less likely to occur." *Kelly*, 970 F.2d at 1277 (citing Fed. R. Evid. 407) (emphasis in original). The *Kelly* court declined to entertain this argument, however. *Id.*

The Court's guidance is needed to resolve this conflict among the circuits, and to avoid further conflict and confusion.

II. THE THIRD CIRCUIT'S APPLICATION OF FED. R. EVID. 407 TO SUPERSEDE STATE SUBSTANTIVE LAW DIRECTLY CONFLICTS WITH DECISIONS OF THE COURT AND OTHER CIRCUITS.

The Pennsylvania Supreme Court recognizes a substantive cause of action for breach of a manufacturer's "post-sale duty to warn". *Walton v. Avco Corp.*, 530 Pa. 568, 577-78, 610 A.2d 456, 459 (1992). This *is* the substantive law of the Commonwealth of Pennsylvania. In a diversity case such as this one, the federal courts are required to apply state law as "declared . . . by its highest court in a decision". *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The trial court's Rule 407 ruling in this case, following Third Circuit precedent and affirmed by Third Circuit, eliminated a substantive right under Pennsylvania law, in disregard of the mandate of *Erie* and its progeny. Under the *Erie* doctrine, "federal courts sitting in diversity apply state substantive law and federal procedural law". *Gasperini v. Center for Humanity, Inc.*, 116 S. Ct. 2211, 2219 (1996). The federal courts must defer to state law where the issue is substantive. *Id.* at 2219-21.

Erie is codified in the Rules Enabling Act, which provides that the Court has the power to prescribe rules of evidence applicable in the federal courts but that these rules "shall not abridge, enlarge, or modify any substantive right". 28 U.S.C. § 2072. "Classification of a law as

'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor". *Gasperini,* 116 S. Ct. at 2219. *See also Burlington Northern Railroad Co. v. Woods,* 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.,* 446 U.S. 740, 750-52 (1980); *Guaranty Trust Co. v. York,* 326 U.S. 99, 109 (1945), *Hanna v. Plumer,* 380 U.S. 469-74 (1965).

This past year, in *Gasperini,* the Court addressed the substantive/procedural dichotomy in the context of a New York state statute that imposed a statutory cap on damages. The Court applied a modified "outcome determinative" test based on both *Guaranty Trust* and *Hanna*:

> Does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the parties in a State court?. . . . Where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. . . . [T]he outcome determinative test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."

116 S. Ct. at 2219-20. Applying that test, the Court held that the New York statute was substantive and should be applied by a federal court sitting in diversity. *Id.* at 2221.

So, too, here. If this case had been brought in Pennsylvania state court, evidence of Cessna's pre-accident

conduct would have been admissible to prove that Cessna knew of a defect in the aircraft and breached its duty to warn under state law, not simply as a matter of proof under state rules of evidence but as a substantive right as a matter of Pennsylvania common law.[2]

In short, the Third Circuit's interpretation of Rule 407, in contradiction of the plain language of the rule, is "outcome determinative" because it creates a different result in federal court than in state court. As such, it contravenes the twin aims of the *Erie* rule and requires the Court's intervention.

In this case, the Third Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 10.1(a).

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[2] Thus, the Third Circuit not only declined to follow state law as declared by Pennsylvania's highest court in a decision, but its decision here also conflicts with decisions of other circuits. *See Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159, 1163 (D.C. Cir.), *cert. denied*, 498 U.S. 950 (1990) (federal courts, in following Federal Rules of Evidence, are merely enforcing a procedural rule, not supplanting state law); *McInnis v. AMF, Inc.*, 765 F.2d 240, 244 (1st Cir. 1985) (state law may not be displaced in a diversity action).

CONCLUSION

For the reasons set forth above, petitioner urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: February 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1166

RICHARD E. FARLEY,
Appellant

v.

THE CESSNA AIRCRAFT COMPANY

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, LEWIS, MCKEE and GARTH,
Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

NOV. 26, 1996

*Judge Garth voted only as to rehearing before the original panel.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1166

RICHARD E. FARLEY,

Appellant

v.

THE CESSNA AIRCRAFT COMPANY

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 93-cv-06948)
District Judge: Honorable Louis C. Bechtle

Argued, Monday, October 7, 1996

BEFORE: MANSMANN, GREENBERG
and GARTH, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions[1] raised by appellant, Richard E. Farley, it is

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[1] The court notes that the appellant dropped his negligence claim at trial and thus in his brief recites that "the case proceeded to trial on two difficult strict liability theories: (1) that defects in the fuel system caused the aircraft to lose power and crash; and (2) that the aircraft was not crashworthy based upon Cessna's failure to install shoulder harness in the aircraft." In the circumstances, the issues which we entertain on the

ADJUDGED AND ORDERED that the judgment of the district court dated January 25, 1996 be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Leonard I. Garth
Circuit Judge

ATTEST:

/s/ Bradford Baldus
Chief Deputy Clerk

DATED: October 25, 1996

---

appeal are limited by the holding in *Spain v. Gallegos*, 26 F.3d 439, 454 (3d Cir. 1994).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD E. FARLEY	:	CIVIL ACTION
v.	:	NO. 93-6948
THE CESSNA AIRCRAFT COMPANY	:	

MEMORANDUM ORDER

(Filed Apr. 16, 1996)

AND NOW, TO WIT this 15th day of April 1996, upon consideration of Defendant's Motion for Reconsideration and to Correct Clerical Mistake, and Plaintiff's response thereto, IT IS ORDERED that said motion is GRANTED IN PART AND DENIED IN PART.

In its Memorandum and Order of January 25, 1996, the court partly granted and partly denied Plaintiff's Motion to Supplement the Record. Plaintiff wanted to supplement the record with sixty-eight exhibits that the court at trial had ruled inadmissible under Federal Rule of Evidence 407.

The court permitted Plaintiff, as a "housekeeping" measure, to supplement the record with exhibits offered *solely* as evidence of conduct by Defendant consisting of post-manufacture remedial and corrective measures, to prove negligence or that the aircraft was defective when manufactured. The court permitted Plaintiff to supplement the record to argue only that the court erred in excluding those exhibits that had been offered *for that limited purpose*. The court denied Plaintiff's motion as to the portions of the exhibits that Plaintiff offered for any

other purpose. Plaintiff did not formally proffer these exhibits at trial in support of the issue of post-sale remedial and corrective measures by Defendant, and the court intended its Order to accomplish the same result as if he had done so.

Defendant asserts that it will be prejudiced by not being able to object to the exhibits on evidentiary grounds. The court, however, has already ruled the exhibits inadmissible to support Plaintiff's proffer, to wit, post-manufacture remedial and corrective measures, taken by Defendant offered to establish that Defendant was negligent when it manufactured their product or that the product was defective at the time it was manufactured. While it may have been preferable for Defendant to have objected to the exhibits that were itemized and described in Plaintiff's motion, when that motion was filed, the outcome even now is the same.

Defendant also argues that Plaintiff has waived his right to offer the exhibits because he did not offer them at trial. The court is not as certain on this point as Defendant appears to be. The trial was a lengthy one, with many exhibits offered, and many received into evidence. In fairness to Plaintiff, and out of a sense of caution that the court does not believe Defendant will be prejudiced, by allowing the documents to be added to the record, at this time, for the narrow purpose described in the court's Order, the court is of the view that its ruling on Plaintiff's motion was correct. The court considers the addition, as offered by Plaintiff, a "housekeeping" matter.

If the Court of Appeals rules that a manufacturer's post manufacture remedial and corrective measures concerning a product are admissible by a plaintiff to

prove the defendant was negligent, or that its product was defective when manufactured, there would presumably have to be a new trial because of the court's ruling excluding them by the authority of *Kelly v. Crown Equipment Co.*, 970 F.2d 1273 (3d Cir. 1992). The Court of Appeals presumably would not direct the granting of judgment for Plaintiff but, in the circumstance, would award a new trial. That would be the time and place for Defendant to offer the objections it now complains that it should be entitled to make at this time.

On another issue, Defendant asserts that the court was incorrect when it made the following statement on page 3 of its January 25, 1996, Memorandum: "The jury did not reach the issues of crashworthiness or assumption of the risk." The court believes that a more complete statement of that feature of the case is as follows:

> Because the jury found that the aircraft was not defective, it did not reach the interrogatories concerning the cause of the accident or the interrogatory concerning Plaintiff's claim of enhanced injuries, which was central to his crashworthiness claim. The jury also did not reach the issue of assumption of risk.

Accordingly, these two sentences shall replace the final sentence on Page 3 of the court's Memorandum and Order of January 25, 1996.

SO ORDERED.

/s/ Louis C. Bechtle, J.
LOUIS C. BECHTLE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FARLEY	:	CIVIL ACTION
v.	:	NO. 93-6948
THE CESSNA AIRCRAFT COMPANY	:	

MEMORANDUM AND ORDER

"ECHTLE, J. JANUARY 25, 1996

Presently before the court is plaintiff Richard Farley's ("Farley") motion for a new trial pursuant to Federal Rule of Civil Procedure 59, renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), motion to supplement the record, and motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), and defendant The Cessna Aircraft Company's ("Cessna") opposition thereto. For the reasons set forth below, Farley's motion to supplement the record will be granted in part and denied in part. Farley's other motions will be denied.

I. BACKGROUND

This case involves the crash of a 1946 Cessna Model 140 single-engine aircraft piloted by Farley on April 7, 1993. Farley alleged that during the "climb out" phase of a touch-and-go landing, the plane became starved for fuel, lost power, descended uncontrollably and struck the ground. Farley sustained serious injuries as a result of this crash.

On December 23, 1993, Farley filed a product liability action against Cessna alleging that his injuries were caused by the defective and dangerous design of the aircraft. Farley specifically alleged that his injuries were caused by the aircraft's lack of a stall warning device, adequate fuel drains, an adequate occupant restraint and protection system, and proper nose cowling security. Farley originally sought to recover both compensatory and punitive damages under strict liability, negligence and breach of warranty theories. However, shortly before trial, Farley withdrew his breach of warranty claim.

This matter was brought to trial on May 1, 1995. Prior to jury selection, the court heard nearly two days of arguments on a number of pre-trial motions, including Cessna's motions to preclude evidence of other accidents of Cessna Model 140 aircraft and to preclude evidence concerning its post-sale duty to warn. After considering the applicable Third Circuit and Pennsylvania law, the court ruled that Federal Rule of Evidence 403 precluded the evidence of other accidents of Cessna 140 aircraft, and that Federal Rule of Evidence 407 precluded any reference to Cessna's post-sale remedial conduct if it was to be offered for the purpose of establishing pre-manufacture negligence or that the product was defective when sold in 1946. The court did not bar the evidence if it would be relevant and admissible on other grounds. (Tr. 5/2/95 at 137-40.) Once the court made these rulings, Farley elected to withdraw his negligence claim and proceed with only his strict liability claim against Cessna under § 402A of the Restatement (Second) of Torts. (Tr. 5/3/95 at 15-16.)

During the trial, Farley maintained that the Cessna 140 he was flying on April 7, 1993 was defective as it was

originally designed and manufactured by Cessna in 1946, because the aircraft lacked shoulder harnesses and a visual or audible stall warning device, and because the aircraft's fuel system harbored several ounces of undrainable water which caused an interruption in power when the water was aspirated into the engine. Farley also maintained that the aircraft was not crashworthy, and that the serious facial and upper body injuries he suffered as a result of the crash could have been lessened or prevented if the accident aircraft was equipped with shoulder harnesses. Cessna, on the other hand, maintained that the aircraft Farley was flying on April 7, 1993, was a "classic old aircraft" which was not defective when it was manufactured and sold by the company. Cessna also maintained that Farley, an experienced commercial pilot who had logged several hours flying in his father's C-140, assumed the risk of his injuries by flying in a Cessna 140 without shoulder harnesses. After nearly four weeks of testimony, on May 30, 1995, the jury returned a verdict in favor of Cessna, finding that the accident aircraft was not defective as it was originally designed and manufactured by Cessna in 1946. The jury did not reach the issues of crashworthiness or assumption of the risk.

On June 2, 1995, the court entered judgment in favor of Cessna and against Farley. Shortly thereafter, Farley filed the instant motion for a new trial pursuant to Federal Rule of Civil Procedure 59, renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), motion to supplement the record, and motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The court will address each of these motions in turn.

II. DISCUSSION

A. Motion for a New Trial

The district court may grant a new trial "on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . . " Fed. R. Civ. P. 59(a). A motion for a new trial is addressed to the sound discretion of the trial court, which is in the best position to evaluate firsthand the evidence presented and the conduct at trial. *See Magill v. Westinghouse Elec. Corp.*, 464 F.2d 294 (3d Cir. 1972). "Even where there is 'substantial evidence' the trial judge may set aside a verdict for the reason that it is against the clear weight of the evidence, or that damages are excessive, or that substantial errors occurred in the admission or rejection of evidence." *Keystone Floor Prods. Co. v. Beattie Mfg. Co.*, 432 F. Supp. 869, 877 (E.D. Pa. 1977).

The court has broad discretion in deciding a motion for a new trial where the proffered ground is trial error. *Klein v. Hollings*, 992 F.2d 1285, 1289-90 (3d Cir. 1993). The court's inquiry in evaluating a motion for a new trial on the basis of trial error is twofold: the court must first determine whether an error was made in the course of the trial; the court then must determine "whether that error was so prejudicial that refusal to grant a new trial would be 'inconsistent with substantial justice.' " *Bhaya v. Westinghouse Elec. Corp.*, 709 F. Supp. 600, 601 (E.D. Pa. 1989) (quoting Fed. R. Civ. P. 61), *aff'd*, 922 F.2d 184 (3d Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991).

Additionally, in cases where a jury could have permissibly drawn the inference it did from the record, a new trial may be ordered where counsel engaged in improper conduct that had a prejudicial effect upon the jury. *Draper v. Airco, Inc.*, 580 F.2d 91 (3d Cir. 1978); *Commercial Credit Business Loans, Inc. v. Martin*, 590 F. Supp. 328, 330 (E.D. Pa. 1984). In such cases, the trial court may set aside the verdict in order to prevent a miscarriage of justice. *Martin*, 590 F. Supp. at 330.

Farley advances five arguments in support of his motion for a new trial: (1) the conduct of defense counsel prejudicially compromised his right to a fair and impartial trial; (2) the court's exclusion of all pre-accident, post-manufacture evidence under Federal Rule of Evidence 407 constitutes a manifest error of law; (3) the court's exclusion of evidence of other Cessna 140 accidents constitutes a manifest error of law; (4) the court abused its discretion in allowing defense "expert" Charles Morin to testify; and (5) the court's instructions to the jury on the issue of assumption of the risk were erroneous and prejudicial. After thoroughly reviewing Farley's arguments, as well as the record of this case, the court finds that a new trial is not warranted.

1. Conduct of Defense Counsel

Farley contends that a new trial is warranted because defense counsel acted improperly by knowingly eliciting inflammatory testimony from a defense witness, and because defense counsel's opening and closing remarks prejudicially compromised Farley's right to a fair trial.

On May 16, 1995, Cessna called Richard Witt, the operator of Doylestown Airport and an eyewitness to the accident, to testify as a defense witness. During his direct examination, Witt was asked by Cessna's counsel whether he had had any post-accident conversations with Farley. Witt responded:

> Not specifically regarding the accident. It was obvious in talking to him that it was painful for him to talk about it. And I didn't want to pursue that.
>
> We did mention the suit, and I expressed to him that I didn't really feel that it was called for. And Mr. Farley mentioned that he really didn't want to have to go through with the suit but he felt that his lawyers were encouraging him to pursue this.

(Tr. 5/16/95 at 122.)

Farley immediately objected and moved for a mistrial. (*Id.*) The court sustained Farley's objection, struck the last portion of Witt's remark, and instructed the jury to disregard it. (*Id.*) The court also denied Farley's motion for a mistrial. (*Id.*) Further questioning outside the presence of the jury revealed that defense counsel had prior knowledge of Witt's conversation with Farley, and that Witt had mentioned to defense counsel that he intended to testify about the substance of the conversation. (*Id.* at 123-24.)

When the jury returned to the courtroom, the court issued a lengthy cautionary instruction to the jury. (*Id.* at 165-68.) The court explained to the jury that both Farley and Witt are lay persons and "the judgment by lay persons as to what they think should happen or shouldn't

happen [with respect to lawsuits] isn't always correct." (*Id.* at 166.) The court further explained that the case was properly before the jury and that Farley's counsel was above reproach. (*Id.* at 165-68.)

The court has examined the transcript of this incident, and it has concluded that Witt's remark does not rise to such a level that it was "reasonably probable" that it influenced the jury's verdict. *See Fineman v. Armstrong World Indus.*, 980 F.2d 171, 207 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993). Although defense counsel's conduct constituted an improper attempt to elicit an inadmissible response from the witness, the court eliminated any prejudice to Farley by promptly and effectively instructing the jury to disregard the testimony elicited by counsel, that the case was properly before the jury, and that Farley's counsel was above reproach.

The court has also examined the transcripts of two other incidents that Farley claims were prejudicial. They are defense counsel's remarks in opening statements about Cessna's theory of how the accident happened, and defense counsel's display of a magazine cover to the jury during closing statements, and it has concluded that these incidents also do not rise to such a level that they were "reasonably probable" to have improperly influenced the jury's verdict.

In the first incident, defense counsel merely explained the facts of the case from Cessna's point of view; *i.e.*, that the accident aircraft was forty-seven years old when it crashed, that an unexplained interruption in power occurred during take-off, and that Farley had just handed off the controls to his passenger when the plane

stalled. Defense counsel also added that Farley should "look in the mirror and accept . . . responsibility" for the crash. (Tr. 5/3/95 at 72.) These remarks did not, as Farley suggests, improperly introduce negligence concepts into the case to such a degree that Farley was unfairly prejudiced.

In the second incident, defense counsel, in his closing statement, displayed a magazine cover that was not in evidence. The magazine cover, from the February 1995 issue of *Plane and Pilot* magazine, featured a vintage Cessna Model 140 under the heading "Immaculate Classic." Defense counsel used the magazine cover to demonstrate his theory that Farley's airplane was forty-seven years old and that age was a factor in causing the airplane to crash. (Tr. 5/30/95 at 112.) Farley's counsel immediately objected, and the court sustained the objection on the grounds that the magazine cover was not in evidence. (*Id.*) The court also instructed the jury to disregard counsel's statement. (*Id.*)

Defense counsel's use of the magazine cover resulted in a display of material not in evidence and was accordingly improper, but it was not so egregious to warrant a new trial. In fact, all of these incidents, when taken together, do not amount to the type of continuous unacceptable conduct that would require the granting of a new trial. *See Fineman*, 980 F.2d at 207 (citing *Draper*, 580 F.2d at 97). Counsel's remarks and conduct, although gratuitous at times, must be viewed in the context of the entire four-week trial. This case was vigorously presented and defended by plaintiff and defendant, respectively, and as can be expected, both parties occasionally strayed from a perfect course. These mistakes were corrected

promptly and in a manner conducive to avoiding unfairness or prejudice. After carefully examining the record, the court is not persuaded that the few isolated incidents identified by Farley as grounds for the relief he seeks are sufficient to warrant the granting of a new trial. Consequently, Farley's motion for a new trial will be denied.

2. Pre-Accident, Post-Manufacture Evidence

On May 2, 1995, the court issued a ruling excluding all evidence of Cessna's pre-accident, post-manufacture conduct regarding the issuance of corrective or remedial service bulletins and communications under Federal Rule of Evidence 407 and the Third Circuit's ruling in *Kelly v. Crown Equipment Co.*, 970 F.2d 1273 (3d Cir. 1992). Farley contends that he was unfairly prejudiced by the exclusion of this evidence because he was effectively precluded from presenting his negligence claim to the jury.

After thoroughly reviewing the parties' arguments regarding the admissibility of this evidence, both before and after the trial, as well as the authorities advanced by each party, the court finds that its ruling to exclude evidence of Cessna's pre-accident, post-manufacture remedial conduct was correct based on the applicable law in the Third Circuit.

Federal Rule of Evidence 407 states, in pertinent part, that "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." In *Petree v. Victor Fluid Power,*

Inc., 831 F.2d 1191 (3d Cir. 1987) (*Petree I*), the Third Circuit held that Rule 407 applies to exclude evidence of pre-accident remedial measures where the manufacturer is sued under a failure to warn theory. *Id.* at 1198. Then, in *Kelly*, the Third Circuit held that Rule 407 applies to products liability actions generally regardless of the theory advanced. *Kelly*, 970 F.2d at 1276. More importantly, the *Kelly* court also held that Rule 407 applies to exclude evidence of pre-accident, post-manufacture design changes in diversity actions applying Pennsylvania law, even though Rule 407 directly conflicts with Pennsylvania products liability law. *Id.* at 1278.

In the present case, Farley sought to introduce evidence of Cessna's pre-accident, post-manufacture remedial conduct to support his claim that Cessna was negligent for issuing service bulletins to aircraft owners advising them to install "quick drains" in their fuel tanks within one year or within several hundred hours of flight time. Farley maintained that the service bulletins were inadequate because they failed to mandate an immediate installation of quick drains, and that they acted as an admission that Cessna knew its fuel tanks were defective. The admission of evidence of Cessna's pre-accident, post-manufacture conduct for this purpose conflicts with the purpose of Rule 407, which is to encourage manufacturers to take affirmative steps to make their products safer, and the Third Circuit's rulings in *Petree I* and *Kelly*. For this reason, the court ruled that evidence of Cessna's pre-accident, post-manufacture remedial conduct was inadmissible for the purpose of proving negligence or a defect in the product. It should be noted that the court did not preclude evidence that could be admissible for

this purpose to be necessarily inadmissible for other purposes. (*See* Tr. 5/2/95 at 137-42; Tr. 5/4/95 at 24-25.) Based on the presentation that is currently before the court, the court is not persuaded that this ruling is in error. Consequently, Farley's motion for a new trial on this basis will be denied.

3. Evidence of Other Cessna 140 Accidents

On May 2, 1995, the court issued a ruling excluding, under Federal Rule of Evidence 403,[1] all evidence of nine water-related accidents involving Cessna 140 aircraft, and several other "high-wing" Cessna aircraft models. (Tr. 5/2/95 at 126-36.) Prior to the court's ruling, Farley was prepared to call five pilots to testify about the circumstances of their accidents. Farley contends that he was unfairly prejudiced by the exclusion of this evidence because he was effectively precluded from demonstrating that undrainable water in the fuel system was a common problem throughout the fleet of Cessna 140 aircraft, as well as with other "high-wing" Cessna aircraft. The court took testimony in the issue of admissibility for nearly a full day. (Tr. 5/1/95 at 28-154; Tr. 5/2/95 at 1-136.)

After thoroughly reviewing the parties' arguments regarding the admissibility of this evidence, both before and after the trial, as well as the authorities advanced by

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[1] Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

each party, the court finds that its ruling to exclude evidence of other Cessna 140 accidents, as well as accidents involving other "high-wing" Cessna aircraft, was correct based on the applicable law and the presentations that the parties made to the court at the time of its ruling.

Although some of the evidence of other water-related crashes may have been relevant to Farley's case, the probative value of this evidence was substantially outweighed by the danger of confusion of the issues, misleading the jury, and by the considerations of undue delay and needless presentation of cumulative evidence. For the admission of evidence of other water-related crashes to be relevant, the court would first have to determine whether the accidents in question were in fact caused by substantially similar circumstances. This would have necessitated at least nine mini-trials on the issue of whether each accident was caused by undrainable water in the fuel system, as opposed to causes due to weather, pilot error, flight conditions, whether there were improper maintenance and pre-flight examinations, other suspected mechanical failures, or a host of similar factors concerning the other accidents. These mini-trials would have taken weeks to complete. The jury would have, during the midst of the principal trial for which they were chosen, been subjected to at least two adverse expert opinions for each of the mini-trials, that would in turn have to be measured against many fact witnesses offered in each of those mini-trials. If, and only if, the jury's decision in each of the sub-trials could be a basis for an inference in the principal trial, which itself is highly speculative, could the jury find this unwieldy body of controversial evidence useful. The jury would

have been further burdened with what surely would have been, even by a modest estimate, many additional trial days for each of these mini-trials. For these reasons, the court ruled to exclude the admission of this evidence under Federal Rule of Evidence 403.

Based on the presentation that is currently before the court, the court is not convinced that its evidentiary ruling on this matter merits revisiting. Consequently, Farley's motion for a new trial on this ground will be denied.

4. Expert Testimony of Charles Morin

Farley argues that the court abused its discretion in admitting the expert testimony of Charles Morin ("Morin"). Farley contends that Morin is a metallurgist by education and training, and thus was not qualified to testify about accident reconstruction and aerodynamics.

Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The admissibility of Rule 702 evidence has three major requirements. *United States v. Velasquez*, 64 F.3d 844, 849 (3d Cir. 1995); *see In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 741-43 (3d Cir. 1994). First, a witness proffered to testify regarding specialized knowledge must be an expert. *Velasquez*, 64 F.3d at 849. Second, the expert must testify to scientific, technical or specialized knowledge. *Id.* Third, the expert's testimony must assist the trier of

fact. *Id.* The court determines whether these three elements are satisfied. *See Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 114 (3d Cir.), *cert. denied*, 484 U.S. 853 (1989) ("The determination of competency of an expert witness rests within the discretion of the district court."). If the court finds that the three elements have been met, the expert may testify, and the factfinder will determine the proper weight to be accorded the testimony.

Farley's memorandum of law in support of his motion argues only that Morin's qualifications are insufficient to enable him to provide Rule 702 expert testimony as to the cause of the crash. The sole issue is whether Morin is an "expert" in this context. Therefore, the second and third prongs of the test will not be addressed by this court.

The requirement that the witness be an expert has been interpreted liberally by the Third Circuit. *Velasquez*, 64 F.3d at 849; *Paoli R.R. Yard*, 35 F.3d at 741. Specifically, that court has held that generalized qualifications of expertise are satisfactory to meet this criterion. *Paoli R.R. Yard*, 35 F.3d at 741 (citing *Hammond v. International Harvester Co.*, 691 F.2d 646, 652-53 (3d Cir. 1982) (holding that an engineer could testify as an expert in a product liability action involving tractors even though his only qualifications were that of an automotive and agricultural equipment salesman); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87-88 (3d Cir. 1979) (holding that an expert could testify that unguarded elevator buttons constituted a design defect despite the expert's lack of specific background in the field of design and manufacture of elevators)). Importantly, the Third Circuit has specifically held that an expert witness can be qualified as such on the

basis of practical experience as well as academic training and credentials. *American Technology Resources v. United States*, 893 F.2d 651, 656 (3d Cir.), *cert. denied*, 495 U.S. 933 (1990) (citing *Hammond*, 691 F.2d 646).

In this case, Morin testified at trial that he is not a pilot, has no aeronautical engineering degree, has never taken a course in aeronautical engineering, aerodynamics, aircraft design, aircraft structures, or biomechanical engineering, never attended a Federal Aviation Administration ("FAA") or National Transportation Safety Board ("NTSB") investigation course as a student, never published a paper in the field of accident reconstruction, never worked for an aircraft manufacturer or designed aircraft parts – other than as a paid witness for litigation, and never designed an aircraft restraint system.

Despite these facts, it is plain that Morin qualifies as an expert in the disciplines to which he testified. He took courses related to aeronautical engineering and has had many years of practical experience in the field. During his twenty years of engineering experience, he has specialized in aviation-related investigations and several times has served as a field member of a NTSB investigative team. He has participated in more than 100 accident reconstructions and has taught courses in accident investigation for the FAA. Morin's significant practical experience in accident reconstruction demonstrates that he is qualified to give an expert opinion about what caused Farley's plane to crash and exactly how that crash occurred.

Because the three criteria are satisfied, Morin's expert testimony is admissible under Rule 702. Farley had ample

opportunity to cross-examine Morin about his qualifications as an expert in the context of an airplane crash and to argue to the jury that it should disregard Morin's testimony because he is a metallurgist by education and training. Any deficiencies in Morin's qualifications are relevant as to the *weight* of his testimony, but not its *admissibility* under Rule 702.

Based on the parties' arguments, the court is not persuaded that this ruling is in error. Therefore, Farley's motion for a new trial on this ground will be denied.

5. The Assumption of the Risk Charge

Farley also argues that the court improperly charged the jury on the assumption of risk. He argues that there was no evidence that Farley was subjectively aware that the aircraft was defective because it lacked a stall warning device and voluntarily accepted that known risk. This error, Farley argues, prejudices his case because the jury may have considered his conduct in its deliberations. Farley's argument fails for two reasons.

First, the court properly instructed the jury as to the assumption of risk defense. Under Pennsylvania law, assumption of risk is a complete defense in a § 402A products liability action alleging design defect or failure to warn rising to the level of a design defect. *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 657 (3d Cir. 1989). The issue may be submitted to a jury if the defendant produces "evidence that the plaintiff fully understood the specific risk, and yet voluntarily chose to encounter it." *Wagner*, 890 F.2d at 657. The Third Circuit

and Pennsylvania state courts have held that circumstantial evidence is sufficient to permit the inference that the user knew of, and understood, the risk. *See, e.g., Wagner,* 890 F.2d at 657; *Staymates v. ITT Holub Indus.,* 527 A.2d 140, 146 (Pa. Super. Ct. 1987).

The evidence at trial was sufficient to permit a reasonable juror to find that Farley knew of the absence of stall warning lights and voluntarily and unreasonably proceeded to use the Cessna Model 140. Farley testified that had a great deal of experience in flying the Cessna Model 140. He was aware that a pilot is responsible for knowing the stall characteristics of the aircraft because a pilot needs to know when an aircraft might stall. Farley testified that the Cessna Model 140 that he was flying did not have a mechanical stall warning device. He also testified that he had regularly practiced stalls at 3000 feet or higher. Further, Farley conceded that, when flying at a low altitude, in a takeoff mode, a stall occurring simultaneously with some sort of power loss is a risk to a pilot. He admitted that if he had a stall at 200 or 300 feet above the ground, he might not be able to recover. Despite knowing all of this, Farley chose to fly his Cessna Model 140 on April 7, 1993. A reasonable juror, based on Farley's testimony, could infer that an experienced pilot such as Farley practices stalls at high altitudes so that the pilot could recognize an impending stall in an emergency situation at a lower altitude. Thus, the court's assumption of the risk charge was proper in this case.

Second, even if Farley is correct that the charge was improper, the error was harmless. Federal Rule of Civil Procedure 61 states, in relevant part:

> No error . . . in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

An improper charge to the jury on the assumption of risk defense is not inconsistent with substantial justice if the jury never reaches the issue. *See Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1023 (D.C. Cir. 1990); *Farra v. Stanley-Bostich, Inc.*, 838 F. Supp. 1021, 1032 (E.D. Pa. 1993). The special verdict form reveals that the jury found that the Cessna Model 140 in which Farley was flying on April 7, 1993 was not defective as it was originally manufactured by Cessna in 1946. Having found that Cessna was not liable for a design defect, the jury never considered Cessna's assumption of risk defense. Further, the possibility that the jury may have considered Farley's conduct is impermissible speculation. *Farra*, 838 F. Supp. at 1032. The court must assume that the jurors acted in accordance with the instructions they were given. *Id.* (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986)).

Farley has not convinced the court that it erred in charging the jury as to the assumption of risk defense and that, if it did err, the error was harmful. Thus, Farley's motion for a new trial on this ground will be denied.

B. Renewed Motion for Judgment as a Matter of Law

A party is entitled to judgment as a matter of law if, after being fully heard with respect to an issue, there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue[.]" Fed. R. Civ. P. 50(a)(1). A party may move for judgment as a matter of law at any time before the submission of a case to the jury. Fed. R. Civ. P. 50(a)(2). "Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Fed. R. Civ. P. 50(b).

In deciding whether to grant a motion for judgment as a matter of law, the court must view the evidence in a light most favorable to the non-moving party, and determine whether the record contains the "minimum quantum of evidence from which a jury might reasonably afford relief." *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1993) (quoting *Keith v. Truck Stops Corp. of Am.*, 909 F.2d 743, 745 (3d Cir. 1990)). The court may not weigh the evidence, determine the credibility of the witnesses, or substitute its version of the facts for that of the jury. *Id.* The court may, however, grant a motion for judgment as a matter of law if, upon review of the evidence, the court finds that the jury's verdict is not supported by legally sufficient evidence. *Id.* at 691-92.

Farley's brief in support of his motion for a new trial or for judgment as a matter of law does not address the basis for his renewed Rule 50 motion. Nevertheless, the

court has reviewed the evidence to determine whether the jury's verdict is supported by legally sufficient evidence. After reviewing the evidence in a light most favorable to Cessna, the court finds that there was ample evidence to support the jury's verdict that the accident aircraft was not defective.

For example, one of Farley's primary allegations was that the accident aircraft was defectively designed and manufactured in 1946 because ventilation holes were drilled in the top of the airplane's fuel cap. He asserted that this allowed water to seep into the fuel tank, this water could not be drained from the fuel tanks during pre-flight preparation, and the undrainable water in the fuel system could eventually bypass the gascolator and enter the carburetor, thereby causing a power interruption. While Farley presented expert testimony to support this allegation, he was unable to present any factual evidence to demonstrate that the accident aircraft actually harbored undrainable water in the fuel system on April 7, 1993, because the emergency personnel who rescued Farley from the wreckage drained the fuel system to prevent a fire. To overcome this difficult factual scenario, Farley presented evidence that the accident aircraft's fuel tanks had a residue on the inside that could only have been caused by undrained water. To rebut Farley's allegation, Cessna presented evidence that the FAA found no evidence of undrainable water in the fuel system when it investigated the crash. To account for the presence of residue in the fuel tanks, Cessna presented the testimony of some of the former owners of the accident aircraft, all of whom testified that the aircraft was stored outside in

Maine for several years and, therefore, subjected to several inches of rain and snow each year. Finally, Cessna presented evidence that a component of the accident aircraft's fuel system had been modified from its original design by an unknown mechanic at some point over the years and, therefore, the airplane that crashed in 1993 was materially different from the aircraft that left the factory in 1946. In light of the evidence presented by Cessna, it was reasonable for the jury to find that the accident aircraft's fuel system was not defective.

After construing the evidence in a light most favorable to Cessna, the court finds that the record contains at least the "minimum quantum of evidence from which a jury might reasonably afford relief." *See Parkway*, 5 F.3d at 691. Consequently, Farley's renewed motion for judgment as a matter of law will be denied.

C. Motion to Supplement the Record

Farley has moved to supplement the record with sixty-eight exhibits. In his motion, he characterizes his efforts here as merely "housekeeping." (Pl.'s Mot. to Supp. Record ¶ 11.) To the extent that is so, the court sees no harm in granting the motion. The court wants to make plain, however, the extent to which this court is willing to grant relief. In section II.A.2. *supra*, the court set out in some detail the circumstances surrounding the court's ruling on certain categories of evidence that it precluded Farley from offering into evidence. Without repeating what is stated there, it would be pertinent in this context to recall that, when the court heard the parties' presentations on their motions *in limine* and the like, and before

the parties opened to the jury, the court ruled that Farley could not offer into evidence for the purpose of proving negligence or that the Cessna aircraft in question was defective when sold, any service bulletins or other communications by Cessna that were post-manufacture corrective and remedial measures that were either recommended or being communicated to owners and users of Cessna aircraft. (Tr. 5/2/95 at 137-42.) It is also important to recall that the court did not preclude Farley's evidence of such conduct by Cessna if it was offered for other purposes which implicitly provided, of course, that those offers would not be inadmissible on other grounds. (Tr. 5/2/95 at 138-39; Tr. 5/3/95 at 23-25.) With the foregoing in mind, the court assumes that Farley's assertion that his motion to supplement the record is strictly a "housekeeping" chore, and will grant the motion to the extent that the contents of any of the exhibits being offered as a supplement are exhibits that were to be offered by Farley *solely* as evidence of conduct by Cessna consisting of post-manufacture remedial and corrective measures taken by Cessna and offered by Farley to prove that Cessna was negligent in the manufacture of the subject Cessna aircraft in 1946, or that the subject aircraft was defective when sold by Cessna in 1946. To the extent that the contents of any of the proffered exhibits are offered for any other purpose, the motion to supplement is denied.

D. **Motion for Relief from Judgment**

A court may relieve a party from final judgment due to fraud or other misconduct of an adverse party.[2] To reopen a judgment under Rule 60(b)(3), the moving party must show "that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case." *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983). Such fraud must be demonstrated by clear and convincing evidence. *Brown v. Pennsylvania R.R. Co.*, 282 F.2d 522, 527 (3d Cir. 1960), *cert. denied*, 365 U.S. 818 (1961). Moreover, the moving party must show that this fraud is attributable to the *party* or, at least, to counsel. *See Stridiron*, 698 F.2d at 207.

Farley maintains that the judgment in this case must be overturned because he has recently acquired information from a third party indicating that one of Cessna's expert witnesses, Jack Eggspuehler of Aviation Specialists, may have fabricated a videotape shown to the jury. The videotape purportedly demonstrates that water retained in the fuel tank of a Cessna C-140 tends to settle

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[2] Fed. R. Civ. P. 60(b). The rule reads, in pertinent part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

Id.

toward the rear of the fuel tank during flight and, therefore, will not drain into the outlet of the fuel tank, be aspirated into the engine, or cause an interruption in power.

Farley maintains that, after the trial in this case, he received information from Vaughn R. Ross, an aircraft accident reconstructionist who investigated Eggspuehler's flight test methodology in *Pim v. Air South, Inc.*, Case No. 618-588, Superior Court of Orange County, California, an unrelated water-in-fuel case in which Cessna was a party. According to an affidavit submitted by Ross, Eggspuehler's firm performed a similar flight test where water was put into the fuel system of a Cessna C-152 and the plane was flown with similar results; *i.e.*, a video camera placed in the fuel tank recorded the water settling to the rear of the tank, away from the aircraft's inboard fuel tank outlet. (Ross Aff. ¶ 5.) When Ross investigated Eggspuehler's methodology, he allegedly found that the Cessna C-152 was never in any danger of crashing due to engine failure because the pilot of the plane simply pushed on the airplane's rudder pedal, creating an out-of-trim condition during flight, which forced the water to the back of the tank and away from the inboard fuel tank outlet. (Ross Aff. ¶ 9.) According to Farley's expert witness, Douglas Stimpson, if Eggspuehler created the same out-of-trim condition during the flight test which produced the videotape shown to the jury in this case, the same result would have occurred, and it would incorrectly appear that it is impossible for water retained in the C-140's fuel system to drain into the engine. (Stimpson Aff. ¶¶ 7-9.) Based on this information,

Farley maintains that the jury's verdict is based on fraud, and that the judgment must be set aside.

In response, Cessna has denied Farley's allegations that its fuel system tests were fabricated. Cessna contends that the tests in this case were performed by Eggspuehler and employees of another company, Aerosafe, Inc., and that Aviation Specialist's participation in the tests was limited to preparing certain exemplar C-140 aircraft. (Cessna Answer to Rule 60(b) Motion ("Answer") ¶ 2.) Cessna also contends that the tests were not performed to show that water could not enter the fuel tank drains, but rather "to demonstrate how much water can be present in the fuel tank during flight without causing a hazard to engine operation." (Answer ¶ 4.) Cessna further contends that, although Eggspuehler testified as an expert witness on behalf of Cessna in the *Pim* case, neither Eggspuehler nor Aviation Specialists conducted the water-in-fuel tests in that case. (Answer ¶¶ 6-8.) Finally, Cessna contends that Ross is not qualified to give his opinions about the validity of Eggspuehler's test methodology because Ross does not have any demonstrated expertise in aircraft fuel systems, he is not licensed by the FAA to fly fixed wing aircraft, and he is not a licensed A&P mechanic.

After considering the arguments submitted by both parties, as well as the witnesses' affidavits, the court finds that Farley's motion to reopen the judgment under Rule 60(b) is without merit. Farley has not offered any credible evidence to demonstrate that Cessna has engaged in any fraud or misconduct in this case. Farley's motion is based entirely upon the affidavit of an unqualified individual, concerning flight testing performed by a different expert witness in an unrelated case, which

involved a different model aircraft in a different accident scenario. This evidence is wholly inadequate to support a decision to reopen the verdict in this case. Consequently, Farley's motion for relief from judgment will be denied.

III. CONCLUSION

For the reasons set forth above, Farley's motion for a new trial pursuant to Federal Rule of Civil Procedure 59, renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), and motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), will be denied. Farley's motion to supplement the record will be granted in part and denied in part.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FARLEY	:	CIVIL ACTION
v.	:	
THE CESSNA AIRCRAFT COMPANY	:	NO. 93-6948

ORDER

(Filed Jan. 25, 1996)

AND NOW, TO WIT, this 25th day of January, 1996, upon consideration of plaintiff Richard Farley's motion for a new trial pursuant to Federal Rule of Civil Procedure 59, renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), and motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), and defendant The Cessna Aircraft Company's opposition thereto, IT IS ORDERED that plaintiff's motions are DENIED.

IT IS FURTHER ORDERED that, upon consideration of plaintiff Richard Farley's motion to supplement the record, and defendant The Cessna Aircraft Company's opposition thereto, said motion is GRANTED IN PART AND DENIED IN PART.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE, J.

FEDERAL RULES OF EVIDENCE

Rule 407 of the Federal Rules of Evidence provides as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as providing ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.